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November 26, 2005

*Via Certified Mail, Return Receipt*

Hon. Kathleen Sebelius  
Governor of the Great State of Kansas  
Office of the Governor, Capitol  
300 S.W. 10<sup>th</sup> Avenue, Suite 2125  
Topeka, Kansas 66612-1590

Hon. Francis J. Harvey  
Secretary of the Army  
101 Army Pentagon  
Washington, D.C. 20310-0101

Hon. Stephen L. Johnson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

General Carl A. Strock  
Chief of Engineers  
U.S. Army Corps of Engineers  
441 G Street N.W.  
Washington, D.C. 20314

Hon. Gale A. Norton  
Secretary  
U.S. Dept. of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Hon. Roderick L. Bremby  
Secretary  
Kansas Dept. of Health and  
Environment  
Curtis State Office Building  
1000 S.W. Jackson  
Topeka, Kansas 66612

Waste Connections of Kansas, Inc.  
c/o Corporation Service Company  
200 S.W. 30<sup>th</sup> Street  
Topeka, Kansas 66611-0000

Plumb Thicket Mfg., Inc.  
c/o Scott C. Alter  
RR 1, Box 86  
Sharon, Kansas 67138-0000

**Re: Notice of Intent to Sue under the Clean Water Act--Plumb Thicket  
Landfill, Harper County, Kansas**

Ladies and Gentlemen:

Pursuant to Section 505(a)(1) of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1365(a)(1) and (2), the Tri-County Concerned Citizens, Inc., a Kansas not-for profit corporation ("TCCCI"), and Dalton Holland, an individual resident of Kansas, challenge as arbitrary, capricious, unsupported by substantial evidence and contrary to applicable law, the U.S. Army Corps of Engineers' ("Corps") erroneous determination that no jurisdictional wetlands would be impacted at the proposed Plumb Thicket Landfill site described below ("Site"); and that the wetlands are not subject to the Clean Water Act because they are "isolated" and therefore not a "water of the United States"; and for the improper and negligent filling of waters of the United

05-001-7884



States which has resulted in pollutant discharges into the waters of the United States and has caused injury to members of TCCCI and Dalton Holland. Unfortunately, the erroneous determination was apparently based on incorrect data provided to the Corps by the project applicant who proffered that the only wetland on the Site encompassed less than .3 acres and is "isolated" and therefore is not a "water of the United States" to the exclusion of other evidence and data that could have been obtained from a Site visit.

The U.S. Environmental Protection Agency ("EPA") is ultimately responsible for the protection of wetlands,<sup>1</sup> and the Corps acts as the EPA's agent pursuant to a Memorandum of Understanding when it renders wetland jurisdictional determinations. Therefore, both entities are subject to suit under 33 U.S.C. § 1365(a)(2) when the Corps fails to make reasoned wetland determinations and the EPA Administrator fails to exercise oversight.<sup>2</sup>

The waters of the United States at issue are located on land owned or controlled by Waste Connections of Kansas, Inc., either a Kansas or a Delaware corporation, and Plumb Thicket Mfg., Inc., a Kansas corporation. The subject Plumb Thicket Landfill is located at the West Half of Section 03 and East Half of Section 04, Township 31 S, Range 06 W, Harper County, Kansas ("Site"). The waters on the Site include three unnamed tributaries to the Chikaskia River,<sup>3</sup> which are intermittent streams subject to the Corps' jurisdiction. The Site also encompasses the headwaters and drainage to Freeman's Canyon on its south. Freeman's Canyon supports wetlands vegetation. The construction of a landfill at the Site will remove the headwaters of Freeman Canyon Creek, which is tributary to the Chikaskia River, and degrade or destroy wetlands on the Site which will cause degradation of these tributaries and the River. The Chikaskia River is a source of drinking water for approximately 25,000 people in southern Kansas and northern Oklahoma and is one of the few high quality rivers left in either State. Also, construction of the landfill at the Site is reducing groundwater recharge that supports the intermittent streams and is causing erosion which is adversely impacting streams and wetlands down slope.

The Clean Water Act prohibits the discharge of dredge or fill material from a point source into the waters of the United States except pursuant to and in compliance with a permit issued by the Corps.<sup>4</sup> Waters of the United States include tributaries of navigable waters and their adjacent wetlands.<sup>5</sup> The Corps acted arbitrarily and capriciously and committed procedural error when it failed to classify the wetlands on the Site as jurisdictional wetlands subject to Section 404 of the Clean Water Act. As of the

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<sup>1</sup> *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (7<sup>th</sup> Cir. 1983).

<sup>2</sup> 33 U.S.C. § 1344(c); *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4<sup>th</sup> Cir. 1988).

<sup>3</sup> 1971 U.S. Geological Survey Adams Quad Topographical Map shows intermittent streams in the footprint of the Site.

<sup>4</sup> 33 U.S.C. § 1311(a); 33 U.S.C. § 1344.

<sup>5</sup> 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *United States v. Deaton*, 332 F.3d 698 (4<sup>th</sup> Cir. 2003).



date of this letter, approximately 5.4 acres of wetlands, out of a total of approximately 58 acres of wetlands at the Site, have been or are in the process of being destroyed to construct the landfill in violation of law. See Exhibit 1.

In addition, Pond I at the Site was built in a floodplain and across an unnamed tributary to the Chikaskia River. See Exhibit 2. Such activity constitutes the illegal dredging and filling of waters of the United States without a Section 404 permit.

Furthermore, the owner/operator of the proposed landfill at the Site is in violation of its general permit under the National Pollutant Discharge Elimination System ("NPDES") program for stormwater.<sup>6</sup> The ongoing discharges of rock, dirt, eroded soils, sediment and debris into waters of the United States violates Section 402 of the Clean Water Act.<sup>7</sup> See Exhibit 3.

Once the Corps properly asserts jurisdiction over the wetlands on the site, the owner or operator must make the following demonstrations, among others, to the Director of the Kansas Department of Health and Environment:

- (1) Where applicable under section 404 of the Clean Water Act or applicable State wetlands laws, the presumption that practicable alternative to the proposed landfill is available which does not involve wetlands is clearly rebutted; . . . (2) The construction and operation of the MSWLF unit will not: (i) Cause or contribute to violations of any applicable State water quality standard, . . . (iii) Jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of a critical habitat, protected under the Endangered Species Act of 1973, . . .<sup>8</sup>

While not endangered or threatened under federal law, please note that a federal candidate species, the Arkansas darter (*Etheostoma cragini*), is present on and near the Site. The darter has been found in the Freeman's Canyon drainage system, which contains its habitat. "The Arkansas darter is a fish with widespread distribution throughout the Arkansas River basin in Arkansas, Kansas, Colorado, Missouri and Oklahoma. Threats to this species include water quantity depletion such as withdrawal of groundwater within the Arkansas River basin in Kansas, water quality degradation resulting from increased urbanization and agricultural activities, and genetic isolation."<sup>9</sup> The Chikaskia River is in the Arkansas River basin.

In addition, marshes and buffalo wallows on the Site provide habitat for the Strecker's chorus frog (*Pseudacris streckeri*), a Kansas threatened species found only in

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<sup>6</sup> 40 C.F.R. § 122.26(c)(1).

<sup>7</sup> 33 U.S.C. § 1342; 40 C.F.R. § 122.21.

<sup>8</sup> 40 C.F.R. § 258.12.

<sup>9</sup> 70 Fed. Reg. 24870, 24,897 (May 11, 2005).

Harper and Barber counties.<sup>10</sup> Area residents have reported hearing this frog at and near the Site.

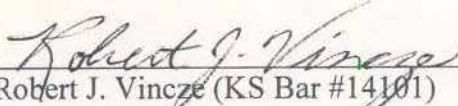
The landfill is expected to result in a marked increase in bird populations including gulls whose diet includes fish and other prey. This increase in bird populations, including birds not normally present in the area, as well as a decrease in water quality and quantity are expected to adversely impact populations of the darter and the chorus frog.

### **Request for Relief**

Tri-County Concerned Citizens, Inc. and Dalton Holland respectfully request that the Corps reconsider the no-jurisdiction determination and that the EPA enforces and prevents the ongoing violations of the NPDES permit for the Site in light of the facts set forth above. If at the close of the 60-day notice period, the Corps has not reconsidered and vacated the earlier wetland determination and the EPA has not enforced the conditions in the NPDES general permit, Tri-County Concerned Citizens, Inc. and Dalton Holland intend to file a citizen suit pursuant to 33 U.S.C. § 1365(a)(1) and (2).

Respectfully submitted,

Law Offices of Robert J. Vincze

  
Robert J. Vincze (KS Bar #14101)  
Tech Center  
4600 South Syracuse, Suite 900  
Denver, Colorado 80237  
303-256-6355

Attorney for Tri-County Concerned  
Citizens, Inc. and Mr. Dalton Holland

cc: Tri-County Concerned Citizens, Inc.  
851 N. State Road 14  
P.O. Box 293  
Harper, Kansas 67058

Mr. Dalton Holland  
1419 Hickory  
Harper, Kansas 67058

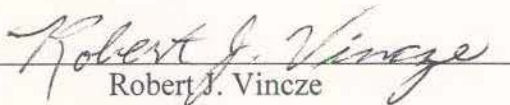
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<sup>10</sup> K.A.R. 115-15-1.



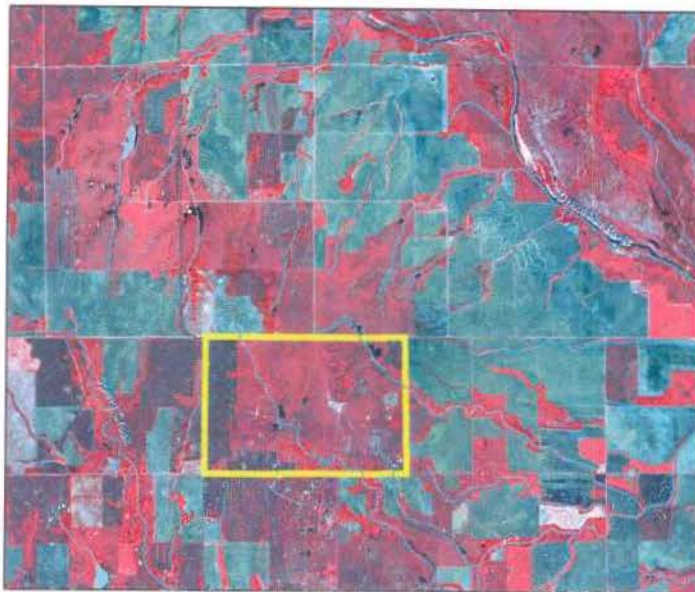
CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of November 2005, I placed a true and correct copy of the above Notice of Intent to Sue with Exhibits in the United States mail, postage prepaid via Certified Mail, Return receipt Requested, to the persons or entities at the addresses indicated on the first page of the above Notice of Intent to Sue.

  
Robert J. Vincze

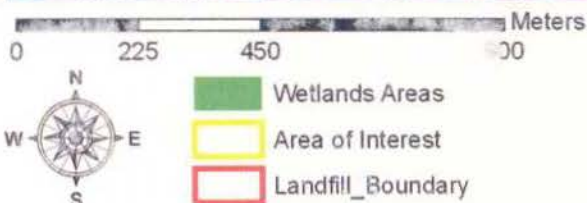
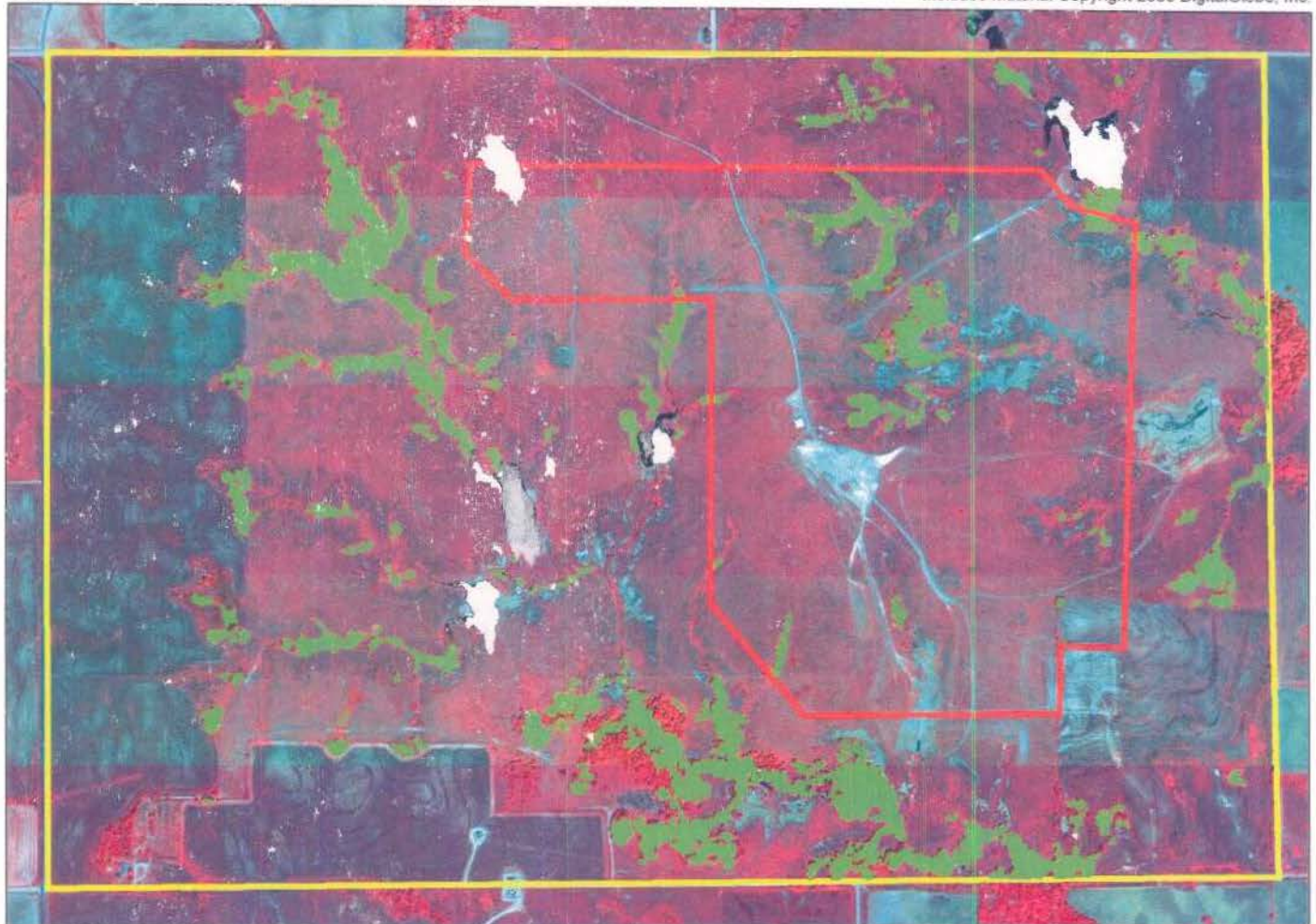


## Harper County, KS Wetlands Assessment



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Based on a preliminary assessment of the high resolution satellite imagery, there appears to be 5.4 acres of wetlands area within the proposed landfill boundary. According to the U.S. Army Corps of Engineers Wetlands Delineation Manual, "remote sensing is one of the most useful information sources available for wetland identification and delineation."





Aerial photo showing weathered formations on the steep side slopes and a continuous zone of saturation on the valley floor.



Two days after a rain...depressions in the footprint capture the excess seepage from the weathered bedrock. The prairie grasses naturally prevent erosion.



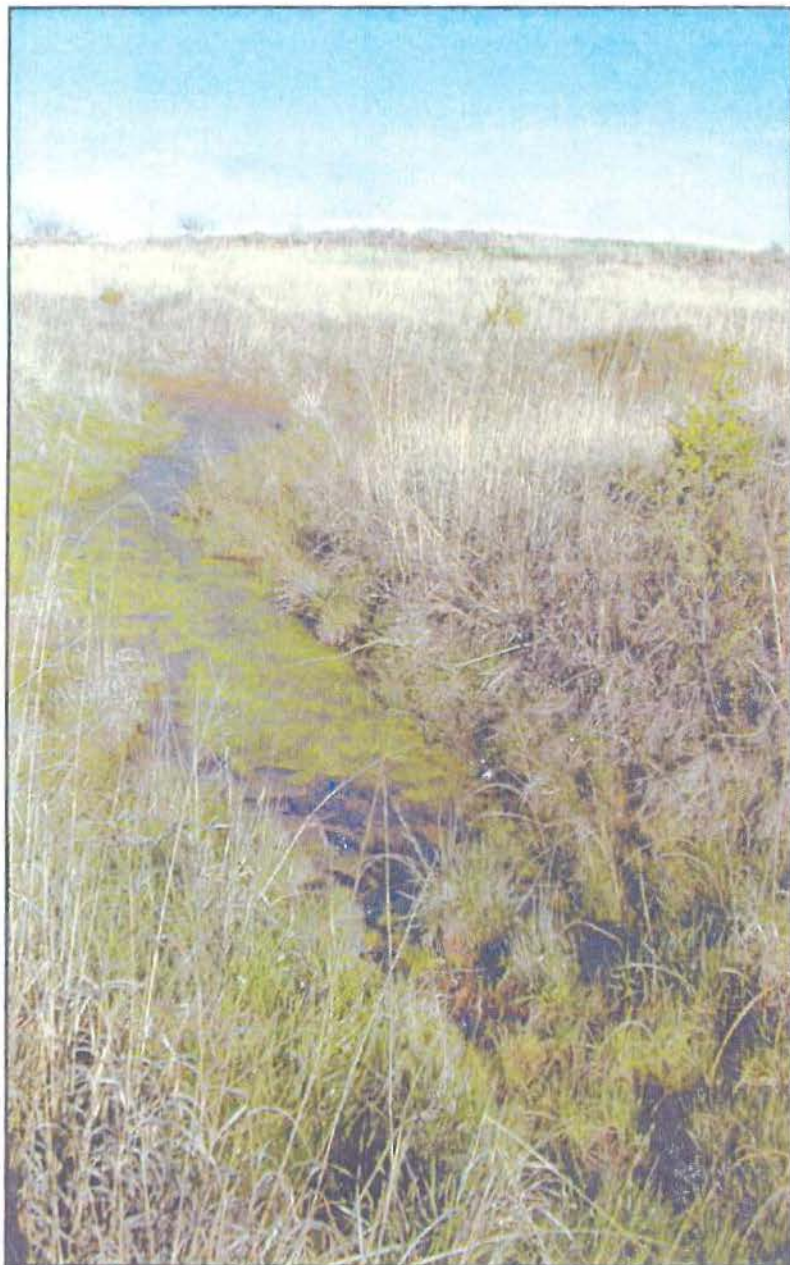
One of several small ponds in the footprint which holds water in drought conditions.



The stream in the footprint supports wetland vegetation and is protected by native grasses.



More Wetlands... West 1/2 Section 3 - Photos taken in April 2003





## Construction of Pond I



Pond I was built in a floodplain and across an unnamed tributary to the Chikaskia River. **No permit issued prior to construction.**



According to KDHE, this activity is permitted for Waste Connections as a land owner and is not part of the landfill process. **This activity has destroyed valuable wetlands.**



“While there have been concerns expressed by nearby irrigation permit owners, it is still in the public interest to capture the contamination plume before it reaches other areas. Therefore, there is no objection to the approval of this term permit”

(email message from Bruce Falk to Mark Jennings of DWR)

**According to DWR, no staff members have visited the site. A fair assessment has not been made on the large amount of surface water involved with this project. The Field Office in Stafford thought the project was on hold and was unaware this pond was already built.**



Drain pipe approx 3-4 feet tall - capacity at spillway invert is 10.8 acre/feet. **How many acres does this pond occupy? Less than three?**



The Special Use Permit, Resolution 2002-04, Section 3 Condition 9 states: "The applicant shall prevent soil erosion on the Subject Property using guidelines established for that purpose by KDHE which is consistent with the MSWLF permit". KDHE visited the site on June 24, 2003 and based on their observations, "it appears that adequate erosion controls are in place to avoid adverse impacts to Freeman Canyon Creek".

**Conditions of the Special Use Permit has already been violated.**



KDHE states, as long as control measures are being met, Freeman's Canyon should not be adversely impacted.



The first attempt at erosion control has proven to be a disaster. This action has caused an adverse impact on Freeman Canyon watershed.



KDHE claims this area did not meet the standard criteria for wetlands, however wetland vegetation is visible behind the silt fence. The Permit Application did not acknowledge this channel. Photo taken before the first rain. Is this adequate erosion control? (June 24, 2003)



The Arkansas Darter requires shallow, clear water where there is not much current and where exposed willow roots provide needed cover. The habitat is now destroyed.